Su'ot Tebari @ Sali Tebari (suing on behalf of himself and three of his siblings) v Superintendent of Land and Survey, Limbang Division & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01(NCVC)(W)-654–11 OF 2021, Q-01(NCVC)(W)-671–11 OF 2021 AND Q-01(NCVC)(W)-672–11 OF 2021
RAVINTHRAN, AZIMAH OMAR AND NOORIN BADARUDDIN JJCA
18 DECEMBER 2025

Land Law — Customary land — Native customary rights — Plaintiff claimed native customary right ('NCR') over four plots of land — Continuous cultivation and occupation — High Court declared plaintiff had acquired native customary right ('NCR') over disputed lands — High Court did not grant order for issuance of titles to plaintiff — High Court did not make order that third defendant's title to disputed land was unlawful — Whether plaintiff succeeded in establishing that he and his siblings possessed native customary right ('NCR') over disputed lands — Land Code (Cap 81) s 95

In the High Court, the plaintiff had filed an action on behalf of himself and his three siblings against the Superintendent of Land and Survey, Limbang Division ('the first defendant'), the State Government of Sarawak ('the second defendant/the Government'), and the Land Custody and Development Authority ('LCDA') ('the third defendant'/'LCDA') claiming native customary right ('NCR') over four plots of land namely Lot Nos 349, 682, 702, and 722 or the same as edged in red in map marked as 'M' which was attached to the statement of claim. It ought to be noted that Lot 349 had been alienated to LCDA under a lease. The plaintiff contended that his family possessed NCR over the said lands by reason of continuous cultivation and occupation since before 1 January 1958, indeed since prior to the Japanese occupation in 1941. At the conclusion of the trial, the learned High Court judge ('the HCJ') granted declaration that the plaintiff had acquired NCR over the said lands. However, the HCJ did not grant other reliefs, namely an order for issuance of titles to the plaintiff or an order that LCDA's title was unlawful. Hence, the appeal by the plaintiff ('Appeal 654'). The other two appeals were by the Government ('Appeal 671') and the LCDA ('Appeal 671') in respect of the finding of the High Court that the plaintiff had acquired NCR over the disputed lands. The central issue in the present appeals was whether the plaintiff had succeeded in establishing that he and his siblings possessed NCR over the disputed lands.

Held, dismissing Appeal 654 with no order as to costs, allowing Appeal 671

with costs of RM30,000 here and below, and allowing Appeal 672 with costs of RM30,000 here and below:

(1) The HCJ's finding that the plaintiff had proved NCR over the disputed lands was not supported by credible evidence. As the plaintiff's claim was premised on cultivated land unlike a claim for territorial domain, he had to prove that his family had actually cultivated the disputed lands from a period prior to 1 January 1958. The plaintiff was born in 1952 which was after the lands were allegedly cleared by his grandfather. Thus, he could only relate the oral history that he heard from his father. The plaintiff's evidence, although admissible, it was directly contradicted by the aerial photographs tendered by the Government. The inconsistencies in the plaintiff's evidence, the absence of any supporting ground survey, and the aerial photographic evidence favouring the defendants collectively militated against placing any reliance on the plaintiff's account of oral history. Accordingly, the High Court's finding that the plaintiff had established that his family possessed NCR over the disputed lands was unsupported by the evidence and ought be set aside (see paras 44, 46 & 78).

(2) The High Court found that the settlement orders affecting the disputed lands, in particular Lot 349 which was alienated to the LCDA, had not followed the proper procedure; however, no reasons were provided for this finding. In this regard, the Government's evidence demonstrated that settlement orders were issued over the disputed lands pursuant to s 95 of the Land Code, following the 'Mengkalap Settlement Exercise' in 1976 and 1977 (under which the plaintiff and his siblings were given plots of land in the same area). Further, based on evidence, the court found that the plaintiff was aware of the 'Mengkalap Settlement Exercise' from the outset and knew that the disputed lands had not been allocated to him. In the absence of any appeal being lodged under the Land Code despite such knowledge, even if the plaintiff had proved NCR over the disputed lands, the court was of the view that it was too late for the plaintiff to challenge in the present case the orders made under the settlement exercise. Accordingly, the claim was barred by limitation (see paras 9, 80 & 83).

(3) The court opined that the plaintiff's claim that the High Court ought to have ordered rectification of the land register in his favour with respect to Lot 349 was without merit. Even if the plaintiff had succeeded in establishing NCR over Lot 349, the plaintiff would have been entitled to only damages from the Government. The reason was that in a number of cases decided by the Federal Court between 2014 and 2022, it was held that insofar as alienated land was concerned, indefeasibility of title shall prevail over pre-existing NCR. Thus, alienation of land by the State would extinguish NCR. In the premises, earlier precedents on this issue with respect to alienated land could not be relied upon by a native who

had successfully proved NCR to seek rectification of the register. The only remedy was to seek damages against the Government (see para 85).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, plaintif telah memfailkan tindakan bagi pihak dirinya dan tiga adik-beradiknya terhadap Penguasa Tanah dan Survei, Bahagian Limbang ('defendan pertama'), Kerajaan Negeri Sarawak ('defendan kedua/Kerajaan'), dan Lembaga Pembangunan dan Lindungan Tanah ('PELITA') ('defendan ketiga'/'PELITA') bagi menuntut hak tanah adat anak negeri ('NCR') ke atas empat lot tanah iaitu Lot No 349, 682, 702, dan 722 atau yang sama seperti yang di petak merah dalam peta yang ditanda sebagai 'M' yang dilampirkan pada pernyataan tuntutan. Perlu diingatkan bahawa Lot 349 telah diberimilikan kepada PELITA di bawah pajakan. Plaintif berhujah bahawa keluarganya memiliki NCR ke atas tanah-tanah tersebut atas sebab penanaman dan pendudukan berterusan sejak sebelum 1 Januari 1958, malah sejak sebelum pendudukan Jepun pada tahun 1941. Pada akhir perbicaraan, hakim Mahkamah Tinggi yang bijaksana ('HMT') memberikan pengisytiharan bahawa plaintif telah memperoleh NCR ke atas tanah-tanah tersebut. Walau bagaimanapun, HMT tidak memberikan relif-relif lain, iaitu perintah untuk pengeluaran hak milik kepada plaintif atau perintah bahawa hak milik PELITA adalah menyalahi undang-undang. Oleh itu, rayuan oleh plaintif ('Rayuan 654'). Dua rayuan lain adalah oleh Kerajaan ('Rayuan 671') dan PELITA ('Rayuan 671') berkenaan dengan dapatan Mahkamah Tinggi bahawa plaintif telah memperoleh NCR ke atas tanah-tanah yang dipertikaikan tersebut. Isu utama dalam rayuan-rayuan semasa ini adalah sama ada plaintif telah berjaya membuktikan bahawa dia dan adik-beradiknya memiliki NCR ke atas tanah-tanah yang dipertikaikan tersebut.

Diputuskan, menolak Rayuan 654 tanpa perintah mengenai kos, membenarkan Rayuan 671 dengan kos RM30,000 di sini dan di bawah, dan membenarkan Rayuan 672 dengan kos RM30,000 di sini dan di bawah:

(1) Dapatan HMT bahawa plaintif telah membuktikan NCR ke atas tanah-tanah yang dipertikaikan tersebut tidak disokong oleh keterangan yang boleh dipercayai. Memandangkan tuntutan plaintif adalah berdasarkan tanah yang ditanam tidak seperti tuntutan untuk domain wilayah, dia perlu membuktikan bahawa keluarganya sebenarnya telah mengusahakan tanah-tanah yang dipertikaikan tersebut dari tempoh sebelum 1 Januari 1958. Plaintif dilahirkan pada tahun 1952 iaitu selepas tanah-tanah tersebut didakwa dibersihkan oleh datuknya. Oleh itu, dia hanya boleh mengaitkan sejarah lisan yang didengarnya daripada bapanya. Keterangan plaintif, walaupun boleh diterima, ia secara langsung bercanggah dengan fotografi udara yang dikemukakan oleh Kerajaan. Ketidakselarasan dalam keterangan plaintif, ketiadaan apa-apa tinjauan tanah yang menyokong, dan keterangan fotografi udara yang

memihak kepada defendan-defendan secara kolektif menghalang mahkamah daripada meletakkan apa-apa pergantungan pada catatan sejarah lisan plaintif. Sehubungan itu, dapatan Mahkamah Tinggi bahawa plaintif telah membuktikan bahawa keluarganya memiliki NCR ke atas tanah-tanah yang dipertikaikan tersebut tidak disokong oleh keterangan dan harus diketepikan (lihat perenggan 44, 46 & 78).

(2) Mahkamah Tinggi mendapati bahawa perintah-perintah penyelesaian yang melibatkan tanah-tanah yang dipertikaikan tersebut, khususnya Lot 349 yang telah diberimilikan kepada PELITA, tidak mengikuti prosedur yang betul; walau bagaimanapun, tiada alasan diberikan untuk dapatan ini. Dalam hal ini, keterangan Kerajaan menunjukkan bahawa perintah-perintah penyelesaian tersebut telah dikeluarkan ke atas tanah-tanah yang dipertikaikan tersebut menurut s 95 Kanun Tanah, susulan 'Mengkalap Settlement Exercise' pada tahun 1976 dan 1977 (di mana plaintif dan adik-beradiknya diberikan lot-lot tanah di kawasan yang sama). Tambahan pula, berdasarkan keterangan, mahkamah mendapati bahawa plaintif menyedari tentang 'Mengkalap Settlement Exercise' tersebut sejak awal lagi dan tahu bahawa tanah-tanah yang dipertikaikan tersebut tidak diperuntukkan kepadanya. Dalam ketiadaan apa-apa rayuan yang difailkan di bawah Kanun Tanah walaupun setelah mengetahui perkara tersebut, jikapun plaintif telah membuktikan NCR ke atas tanah-tanah yang dipertikaikan tersebut, mahkamah berpendapat bahawa sudah terlambat untuk plaintif mencabar dalam kes semasa perintah-perintah yang dibuat di bawah 'Mengkalap Settlement Exercise' tersebut. Sehubungan itu, tuntutan tersebut dihalang oleh had masa (lihat perenggan 9, 80 & 83).

(3) Mahkamah berpendapat bahawa tuntutan plaintif bahawa Mahkamah Tinggi sepatutnya memerintahkan pembetulan daftar tanah yang memihak kepadanya berkenaan dengan Lot 349 adalah tidak bermerit. Jikapun plaintif berjaya membuktikan NCR ke atas Lot 349 tersebut, plaintif hanya berhak mendapat ganti rugi daripada Kerajaan. Sebabnya ialah dalam beberapa kes yang diputuskan oleh Mahkamah Persekutuan antara 2014 dan 2022, diputuskan bahawa setakat yang berkenaan dengan tanah berimilik, hak milik yang tidak boleh disangkal akan mengatasi NCR yang sedia ada. Oleh itu, pemberimilikan tanah oleh Negeri akan menghapuskan NCR. Dalam premis tersebut, duluan-duluan kes mengenai isu ini berkenaan tanah berimilik tidak boleh disandarkan oleh anak negeri yang telah berjaya membuktikan NCR untuk mendapatkan pembetulan daftar. Satu-satunya remedi adalah untuk mendapatkan ganti rugi daripada Kerajaan (lihat perenggan 85).]

Cases referred to

Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals [2021] MLJU 2794; [2022] 3 CLJ 1, FC (refd)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766; [2014] 9 CLJ 733, FC (refd)

Jimi Mantali & Ors v Superintendent of Lands and Surveys [2010] MLJU 2241; [2011] 1 CLJ 1000, HC (refd)

Luking Uding & Ors v Superintendent of Lands and Surveys Kota Samarahan Division & Ors [2011] MLJU 1594; [2011] 7 CLJ 342, HC (refd)

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 55, CA (refd)

TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77; [2018] 1 CLJ 19, FC (refd)

Legislation referred to

Land Code (Cap 81) ss 2, 5, 5(1), (2), 10, 17, 84, 93, 94, 95, 96, 102, 202

Limitation Ordinance of Sarawak (Cap 49)

Public Authorities Protection Act 1948

Appeal from: *Su'ot Tebari @ Sali Tebari (Suing on behalf of himself and three of his siblings) v Superintendent of Land and Survey, Limbang Division & Ors* [2021] MLJU 3161 (High Court, Miri).

Joshua Parir Baru (with Clarice Chan) (Baru Bian) in Civil Appeal No Q-01(NCVC)(W)-654–11 of 2021 for the appellant.

Mohd Adzrul bin Adzlan (with Adzharye bin Johari) (Sarawak Attorney General's Chambers) in Civil Appeal No Q-01(NCVC)(W)671–11 of 2021 for the appellants.

Sim Hui Chuang (with Rachel Ho) (Reddi & Co) in Civil Appeal No Q-01(NCVC)(W)-672–11 of 2021 for the appellant.

Mohd Adzrul bin Adzlan (with Adzharye bin Johari) (Sarawak Attorney General's Chambers) in Civil Appeal No Q-01(NCVC)(W)-654-11 of 2021 for the first and second respondents.

Sim Hui Chuang (with Rachel Ho) (Reddi & Co) in Civil Appeal No Q-01(NCVC)(W)-654–11 of 2021 for the third respondent.

Joshua Parir Baru (with Clarice Chan) (Baru Bian) in Civil Appeal Nos Q-01(NCVC)(W)-671–11 of 2021 and Q-01(NCVC)(W)-672–11 of 2021 for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] There are three appeals before us, ie Appeal 654, Appeal 671 and Appeal 672. The appeals arise from a suit filed by the appellant to prosecute a native customary right ('NCR') claim over lands that were previously untitled and not demarcated on the map. In the said suit, the plaintiff sued on behalf of himself and his three siblings to assert the NCR claim. The Superintendent of Land and Survey, Limbang Division and the State Government of Sarawak were the first and second defendants. The Land Custody and Development Authority ('LCDA') was the third defendant.

[2] The plaintiff is the appellant in Appeal 654 whereas the Superintendent of Land and Survey, Limbang Division and the Government of Sarawak are the first and second respondents. Where applicable, we shall refer to them collectively as the Government. The LCDA is the third respondent. In Appeal 671, the Government is the appellant whereas the plaintiff is the respondent. In Appeal 672, the LCDA is the appellant whereas the plaintiff is the respondent.

[3] The plaintiff claimed that he acquired NCR or native customary rights over four plots of land, namely Field Lot Nos 349, 682, 702 and 722 or the same as edged in red in map marked as 'M' which was attached to the statement of claim. All the said lots are part of Block 9, Trusan Land District in the Limbang Division of Sarawak. Lot 349 had been alienated to LCDA under a lease. At the conclusion of the trial, the learned High Court judge granted a declaration that the plaintiff had acquired NCR over the said lands. However, His Lordship did not grant other reliefs, namely an order for issuance of titles to the plaintiff or an order that LCDA's title is unlawful. Hence, the appeal by the plaintiff. The other two appeals are by the Government and the LCDA in respect of the finding of the High Court that the plaintiff had acquired NCR over the disputed lands.

SUMMARY OF THE PLAINTIFF'S EVIDENCE

[4] The plaintiff's pleaded case was that the four plots of land referred to in the foregoing passage (the disputed lands) are cultivated lands. His grandfather cleared and cultivated the plots in accordance with the practice of the Lun Bawang community before the Japanese Occupation in 1941. After the passing of his grandfather, the lands were inherited by his father and subsequently passed down to him and his siblings. Up to present time, the plaintiff claimed that he and his siblings have continued to occupy and cultivate the lands without interference from any one.

[5] He claims that since the lands were cleared and cultivated in accordance with the customs of his native community before 1 January 1958, they constitute land over which he and his siblings have NCR under the Land Code of Sarawak (Cap 81) ('the Land Code'). With respect to Lot 349, the plaintiff pleaded that the alienation of the said land by way of a 60-year lease to LCDA is unlawful as there was no extinguishment of NCR. He discovered the fact of alienation in favour of LCDA after the statement of claim was filed. That discovery necessitated an amendment to the statement of claim.

[6] The plaintiff gave evidence and called two other witnesses. He has been a farmer since leaving school at the age of fifteen. The disputed lands have been in his family since his grandfather first cleared the jungle for cultivation, prior to the Japanese Occupation. Upon his father's death in 1967, he and three of his seven siblings inherited the said lands. According to the plaintiff, Lot 349 was given to him by his father, while Lots 702, 682, and 722 were given to Punang, Dayang, and Bakar respectively.

[7] His family planted paddy, fruit trees and other crops on the said lands, which have remained in their possession to this day, as their occupation and enjoyment of the lands have never been disturbed. He identified photographs depicting the fruit trees and crops. He said some of the fruit trees are more than 80 years old.

[8] The plaintiff said he had been asserting NCR claim on behalf of his family since 1977. That was the year when some officers of the Land and Survey Department came to his area to conduct a survey. When he told them about his family's NCR claim, he was told that the survey was for the purpose of a paddy scheme. A neighbouring lot, namely Lot 438 was alienated to him. That was when he discovered the lot numbers of the disputed lands.

[9] However, he is not the maker of the map 'M' on which the lots in question are drawn. It is based on the official map of the Land and Surveys Department. He was also not aware of any settlement orders that were issued on the disputed lands. However, during cross-examination he agreed that he and siblings whom he represents had been given plots of land in the same area in the 1976 and 1977 settlement exercise. The defendants' witness referred to it as the Mengkalap Settlement Exercise and area it covered as the Mengkalap Settlement Area. Settlement is a process administered by Lands and Surveys Department under ss 93–96 of the Land Code, by which formal ownership and title are conferred upon individuals after survey and investigation, with appeals permissible under s 102 of the Land Code.

[10] Although the plaintiff challenges the Mengkalap Settlement Exercise as having deprived him of his native customary rights over the disputed lands, he

acknowledged that the settlement exercise was properly carried out at least in respect of the plots allocated to him and his siblings. The plaintiff alone received twelve plots of land. He further admitted that he subsequently sold those plots to other villagers. He denied, however, that his present claim over the disputed lands is motivated by an intention to sell them.

[11] The second witness was Joel Punang ('PW2'), the nephew of the plaintiff and the son of Punang Tebari. He helped the plaintiff to take photographs of the disputed lands which were planted with crops and fruit trees. He also told the court that the disputed lands have been continuously in his family and that his father and uncle had continued to cultivate the lands. However, he agreed that all his knowledge of the history of the disputed lands is from PW1. He also agreed that the photographs he took do not indicate the location of the trees. He also agreed that there is no evidence to indicate the age of the trees. In fact, he agreed that the trees were planted after 1958.

[12] The last witness for the plaintiff was Asim Tagal ('PW3'). He was 78 years old at the time he gave evidence. He is a village headman in the same area of the disputed lands. He lived in his village for more than half of his life. He knows the plaintiff and his family. He said they have NCR over the disputed lands since the time of their grandfather as they had continuously cultivated the lands and no one objected or interfered with their possession of the same.

[13] During cross-examination, he stated that he did not know the size of the areas claimed by the plaintiff. He was, however, aware that the plaintiff had been granted other lots of land by the Government. He denied any knowledge of the Mengkalap Settlement Exercise carried out by the Lands and Surveys Department. Yet, in the same breath, he acknowledged that he himself had unsuccessfully applied for a land grant under that very settlement exercise. PW3 further accepted that he had been away in the Belait area between 1975 and 1977. However, he disputed the suggestion that, by reason of his absence, another *Penghulu*, one Bagol Lupong, had assumed responsibility for the area in question during that period, which coincided with the Mengkalap Settlement Exercise.

SUMMARY OF THE DEFENDANTS' EVIDENCE

[14] The pleaded defence of the Government is as follows. They denied knowledge that the plaintiff and his family had NCR claim on the disputed lands. They also pleaded that the plaintiff failed to prove that his family had acquired NCR over the lands in accordance with sub-ss 5(1) and 5(2) of the Land Code. Map 'M' that was attached to the statement of claim and which delineates the four plots of land claimed by the plaintiff was disputed on the

ground that it was not prepared by a licensed surveyor under s 17 of the Land Code. A

[15] As for the declarations sought by the plaintiff, the Government pleaded that it can only be done through a process under ss 93–96 of the Land Code by a settlement officer. B

[16] Finally, the Government pleaded that the claims of the plaintiff are barred by limitation law, ie s 202 of the Land Code, Public Authorities Protection Act 1948 and the Limitation Ordinance of Sarawak (Cap 49). C

[17] The witnesses who gave evidence for the Government were Zaidi bin Hamid ('DW2'), Farid Nazmi bin Nuwen ('DW3') and Awang Samsul bin Drahman ('DW4'). All of them are from the Lands and Surveys Department. The witness who gave evidence for LCDA was Samuel Batok ('DW1'). D

[18] DW2 is an Assistant Surveyor in the Limbang Land Office. His duties included interpreting aerial photographs using photogrammetry. However, he agreed during cross-examination that he has no paper qualification in interpreting aerial photographs. His qualification is a Diploma in Land Surveying. However, he attended a course in interpreting aerial photographs and acquired relevant practical experience. He has testified in court and arbitration proceedings previously and his evidence was accepted. In the instant case, he prepared a report after studying and interpreting aerial photographs taken in 1948 and 1958 that covered the disputed lands. His report was tendered as D1. He said that his interpretation was confined to the lots in dispute and did not extend to the entire area depicted in the photographs taken by the Royal Airforce. E F

[19] With respect to Lot 349, he testified that, of its total area of 64 hectares, only ten hectares had been cleared in 1948, the remainder being covered by primary forest. The other lots were completely forested at that time. In the 1958 aerial photograph, the cleared area in Lot 349 had increased marginally to 11 hectares. As regards Lot 682, only 0.3 hectares had been cleared, while 0.9 hectares remained forested. Lots 702 and 722 continued to be covered by primary forest. He further agreed that, by 1976, during the period of the settlement exercise, the extent of the cleared areas would have been greater. G H

[20] DW3 is an Administrative Officer at the Limbang Land Office. His duties included processing land survey applications for purpose issuance of land titles, renewal of land leases and submission of land application to his department's headquarters. Based on the records in the possession of his officer, Lots 682, 702 and 722 were involved in land settlement exercise as part of the Mengkalap Settlement Area. All these lots are part of Block 9, Trusan Land I

A District and remain as unregistered lots. Lots 702 and 722 were fragmented from Lot 348. Lot 682 was fragmented from Lot 399. As for Lot 349 of the same area, he said it became state land by virtue of a Settlement Order on 4 August 1977. Later it was alienated by way of lease in 1992 to LCDA.

B **[21]** He said that the plaintiff and his siblings had successfully claimed some lands during the settlement exercise but the Government's recognition of the occupation of the land by his family was limited to those lands and not to the disputed lands.

C **[22]** DW4 is an Assistant Settlement Officer/Assistant Land Officer at the Limbang Land Office. His duties included processing NCR claims and confirming claims in a settlement exercise. His evidence is similar to that of DW3. He said that he is aware of the NCR claims of the plaintiff. However, the disputed lands became part of the Mengkalap Settlement Area since D 1971 when a Settlement Notification was issued under s 84 of the Land Code. Subsequently two Settlement Orders were issued in 1976 and 1977. He said according to the records kept in his office, during the inquiry stage no one claimed the disputed lands. The headman of the village that time, one Penghulu Bagol Lupong had given evidence at the inquiry that the disputed E lands were situated on high hills and were covered with primary forests. He said there was no appeal when the said lands were declared as unencumbered State Land in 1977. DW4 further said that it is unlikely that the plaintiff was unaware of the settlement exercise as he successfully made claims for land in the same area, ie the Mengkalap Settlement Area.

F **[23]** DW1 was the only witness who testified for LCDA. He is an Agri-Business Executive from one of its subsidiaries. His duties are primarily concerned within bringing NCR landowners on board to participate in joint development of their lands. He would give briefings of joint venture projects to G natives and assist them in the documentation process. The natives would be required to fill in forms known as Kementerian Kemajuan Tanah Borang Tuntutan Tanah ('NCL') Forms and Memorandum of Consent ('MOC') Forms ('KKT') to participate in the LCDA development projects.

H **[24]** With respect to Lot 349 which is now leased to LCDA by the Government, he said no KKT Forms or MOC Forms were submitted by the plaintiff. He also did not come across the plaintiff before the suit was filed.

I AGREED ISSUES FOR TRIAL

[25] The High Court noted that the parties agreed for the following issues to be tried between the Government and plaintiff:

(1) Whether the Plaintiffs are natives of Sarawak?

(2) Whether the Plaintiffs have acquired/ inherited native customary rights over the plots of land known as (hereinafter known as 'the Lands'):

1. Field Lot 349 Block 9, Trusan Land District;
2. Field Lot 682 Block 9, Trusan Land District;
3. Field Lot 702 Block 9, Trusan Land District; and/or
4. Field Lot 722 Block 9, Trusan Land District?

(3) If Questions 1 and 2 above are answered in the affirmative, whether there was any extinguishment of the native customary rights prior to alienation and/or issuance of lease/license over the Lands (collectively and/or respectively)?

(4) If Questions 1 and 2 above are answered in the affirmative, and in the absence of any extinguishment of native customary rights over the Lands, whether issuance of the document of title/lease/license is ultra vires the Sarawak Land Code?

(5) Whether the Settlement Order vide Gazette Notification 2288 (dated 4 August 1977) was issued pursuant to due process?

(6) Whether the Plaintiffs' claim is time barred?

[26] The additional issues, ie the 7th and 8th issues to be tried between the plaintiff and the LCDA were:

(7) Whether the Plaintiff has the authority/rights to bring a representative action on behalf of his alleged 3 siblings of the 15 alleged Native Customary Rights (NCR) Land over plots of Land at Trusan Land District described under paragraph 2?

(8) Whether the 3rd Defendant being the registered proprietor of Lot 349 Block 9 Trusan Land District ('Lot 349') has indefeasible rights over Lot 349 and that such lot is unencumbered by any alleged Native Customary Rights of the Plaintiff or any other alleged rights?

[27] At the outset the following facts were agreed to by the parties, ie that the Government had issued to the LCDA a document of title with respect to Lot 349 and that with regard to the same land, there was a Settlement Order issued under s 95 of the Land Code via *Gazette* No 2288 dated 4 August 1977.

DECISION OF THE HIGH COURT

[28] The first agreed issue was whether the plaintiff is native of Sarawak. The High Court answered the question in the affirmative. Before us it is a non-issue as the Government and LCDA have not disputed the native status of the plaintiff.

[29] The second issue, ie whether the plaintiff and his siblings had acquired NCR over the disputed lands. This is the primary and critical issue upon which the suit of the plaintiff rests. His Lordship found that the plaintiff and his

siblings had acquired or inherited NCR lands. His Lordship said that the plaintiff had proven on a balance of probabilities that he is native customary owner and that he had not abandoned his right to the said lands. Unfortunately, the learned High Court judge did not give a single reason for this critical finding upon which the claim of the plaintiff rested. His Lordship merely said that the question should be answered in the affirmative. In similar fashion, His Lordship also answered the other questions without giving reasons.

[30] With respect to map 'M' attached to the statement of claim, the learned High Court judge said that the plaintiff had identified the 'claimed area in the respective Lots 349, 682, 702 and 722'. He also said map 'M' is the same as P2 which is a map issued by the Department of Land and Survey.

[31] With respect to the third agreed issue, the learned High Court judge found that there was no evidence of extinguishment of the NCR over the lots in question prior to issuance of the lease.

[32] The learned High Court judge answered the fourth and eight issues as follows. His Lordship was of the view that as title had been issued to LCDA with respect to Lot 349, 'in the absence of fraud, the claim for NCR could not override the indefeasibility of title of land in this case'.

[33] With respect to the fifth agreed issue, ie whether the Settlement Order on Lot 349 complied with the Land Code, the learned High Court judge answered the question in the negative. No reasons were given for this finding.

[34] With respect to the limitation issue which is the sixth agreed issue, the learned High Court judge held that the claim of the plaintiff was barred under the following written laws, namely the Land Code, the Public Authorities Protection Act 1948 and the Limitation Ordinance of Sarawak (Cap 49).

[35] Finally, with respect to the seventh agreed issue, the learned High Court judge found on the evidence that the plaintiff had authority to bring a representative action on behalf of his siblings.

[36] As the learned High Court judge did not give any reasons for his conclusion on any of the agreed issues including the primary issue whether the plaintiff or his siblings had acquired or inherited NCR over the disputed lands, the appellate process is not greatly assisted by the written grounds. For this reason, the normal deference accorded to the audio-visual advantage enjoyed by the trial court will not apply in this case. Where necessary, we are therefore constrained to scrutinise the oral evidence of witnesses and the documentary evidence tendered in order to appreciate the issues and decide this appeal.

ISSUES IN THE APPEAL

[37] The status of the plaintiff and his siblings as natives of Sarawak is not in dispute, whether by the Government or by the LCDA. The central issue in this appeal, as it was at trial, is whether the plaintiff has succeeded in establishing that he and his siblings possessed NCR over the disputed lands. Only if the plaintiff is able to prove the existence of such NCR, do the remaining issues become material in relation to the remedies sought.

NATIVE CUSTOMARY RIGHT

[38] In paras 3–5 of the amended statement of claim, the plaintiff founded his NCR claim on the basis of owning land which was once virgin jungle but was cleared and cultivated in accordance with the customs and traditions of his Lun Bawang community since before time of the Japanese Occupation. The lands were cleared by his grandfather who was the pioneering ancestor and have been passed down to him and his siblings through his father. He said that the cleared and cultivated lands that he is claiming are called 'amug' land by his Lun Bawang community. We must mention here that cultivated land in continuous occupation as the basis of an NCR claim is also called 'temuda' land in reported cases as that is the term used by the larger Iban and Bidayuh community of Sarawak.

STATUTORY RECOGNITION OF NCR

[39] By way of background, we shall first briefly address the law pertaining to the legality of NCR over land created by the method described by the plaintiff.

[40] Section 5 of the Land Code enacts that NCR can only be created after 1 January 1958 in accordance with native customary law of the community if a permit is granted under s 10. The methods by which NCR may be acquired under s 5(2) are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method.

[41] However, s 2 of the Land Code, in part, defines Native Customary Land ('NCL') as land in which NCR 'has been lawfully created prior to 1 January 1958 and still subsist as such'. In the landmark High Court case of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769, it was held by Ian Chin J that the Land Code 'does not abrogate whatever native customary rights that existed before the passing of that legislation'. Only for expansion of land, a permit under s 10 is required. Thus, primacy of pre-existing NCR as at 1 January 1958 is respected by the Land Code. This observation of law was endorsed by the Court of Appeal in the appeal from that decision (see *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 55). However, the Land Code also provides for extinguishment of NCR in accordance with the stipulated procedure with payment of compensation.

[42] In the instant case, the plaintiff contended that his family possesses NCR over Lots 682, 702, 722 and 349 by reason of continuous cultivation and occupation since before 1 January 1958, indeed since prior to the Japanese Occupation in 1941. As the learned High Court judge gave no reasons for accepting the plaintiff's claim, it now falls to us to examine the evidence and determine whether it supports that conclusion.

[43] The burden of proof lies on the plaintiff who is asserting the existence of NCR. It is in a sense a heavy burden in the absence of written records dating back to the time of a pioneering ancestor who cleared virgin jungle for settlement and cultivation. However, the courts have, in a number of reported cases on the subject, said that natives can prove NCR by relying on customs, traditions and oral history. However, the evidence must be reliable, consistent and persuasive. In our view, such evidence must not be contradicted by other evidence. Otherwise, as observed by Rhodzariah Bujang J (now FCJ) in *Jimi Mantali & Ors v Superintendent of Lands and Surveys* [2010] MLJU 2241; [2011] 1 CLJ 1000, an NCR claim would be 'easy to make and open to abuse'.

[44] With respect to the High Court, in our view, the finding that the plaintiff had proved NCR over the disputed lands is not supported by credible evidence. Our reasons are as follows.

[45] It must be firstly appreciated that the NCR claim of the plaintiff is premised on possession of cultivated land. It is an individual claim for cultivated land unlike a claim for territorial domain land over a far wider area that sometimes includes cultivated land. Territorial domain can be for the purpose of foraging food, jungle produce and hunting. It will necessarily include primary jungle that provides sustenance for nearby native communities. It is always a communal claim over a wide area. Thus, aerial

photographs taken before 1 January 1958, would still show primary jungle but with some evidence of settlement such as longhouse sites, old and new, and cleared areas for cultivation.

[46] As the plaintiff's claim is premised on cultivated land unlike a claim for territorial domain, he has to prove that his family had actually cultivated the disputed lands from a period prior to 1 January 1958. The plaintiff was born in 1952 which is after the lands were allegedly cleared by his grandfather. Thus, he could only relate the oral history that he heard from his father. We summarised his evidence earlier. We have given it careful consideration as it is admissible. However, we find that it is directly contradicted by the aerial photographs tendered by the Government.

HISTORICAL AERIAL PHOTOGRAPHIC EVIDENCE

[47] The Government tendered two aerial photographs of the area encompassing the disputed lands. One photograph was taken in 1948, and the other in 1958. The largest of the four lots claimed by the plaintiff is Lot 349, measuring 64 hectares. DW1, the Assistant Surveyor, testified that the 1948 photograph shows that only ten hectares had been cleared at that time. By 1958, the extent of the clearing had increased only marginally to 11 hectares.

[48] In our view, even taking the plaintiff's case at its highest, the evidence demonstrates that, as at 1958, no more than 11 hectares of Lot 349 could have been under cultivation, and certainly not the entire 64 hectares, the greater part of which remained jungle throughout the period between 1948 and 1958.

[49] The oral evidence of the plaintiff was that his grandfather had cleared the lots in question before 1941 and the same had been in possession in his family since then. The plaintiff was quite emphatic that all the lands that he now claims were cleared for settlement and cultivated before the time of the Japanese Occupation. He insisted as follows during cross-examination:

> Q: Are you saying that the entire area of Lots 349, 702, 682 and 722 were cleared before 1958?
>
> A: They were cleared by my grandfather, my father and now we are still planting crops on the said lands.
>
> Q: I refer you to page 5 and page 6, Exhibit P1. I put it to you that based on these 2 maps it is quite clear that the majority of the area which you are claiming here today was primary forest areas up to 1958. Therefore, what you have testified earlier is incorrect. Just answer whether you agree or not?
>
> A: I disagree.

[50] However, as we said earlier, in 1958, only 11 of 64 hectares of Lot 349

were cleared as evidenced by the aerial photographs. The aerial photographs with respect to Lots 702 and 722 further contradicted the evidence of the plaintiff. DW2 said they were totally covered with primary forests. As for Lot 682, DW2 said the cleared area was only 0.3 hectares compared to 0.9 hectares. DW2 agreed that the cleared area would be much larger in 1976 when the Mengkalap Settlement Exercise was conducted. However, the law is clear that after 1 January 1958, NCR cannot be created without a permit under s 10 of the Land Code. Thus, the aerial photographic evidence throws the plausibility and credibility of the oral history narrated by the plaintiff into serious doubt.

[51] In our opinion, the aerial photographic evidence of the Government must be given weight. Although DW2 has no formal qualifications in photogrammetry, he gave details of his extensive experience in interpreting aerial photographs and had attended a course on the subject. His evidence had been accepted in the courts in a dozen cases. During cross-examination, his expertise was not challenged beyond an inquiry whether he possess a formal qualification in interpreting aerial photographs. Furthermore, there is no contrary expert opinion before us, as the plaintiff did not call any expert witness to interpret the aerial photographs in question.

[52] The only other evidence tendered by the plaintiff to support the narration of his oral history is the map 'M', photographs taken by his nephew ('PW2') of fruit trees and crops on the lots in question and the evidence of the village headman ('PW3'). We shall first consider the photographs.

[53] The purpose of tendering the photographs into evidence is to prove that the lots in question are under cultivation by the family of the plaintiff. However, PW2 agreed that he did not indicate the location of the photographs. He said that he is not aware of the age of the fruit trees on land. He also said he has no knowledge of the creation of NCR on the disputed lands. Thus, his evidence cannot support the oral evidence of the plaintiff.

[54] We turn next to the evidence of PW3, the former village headman, whose testimony we have summarised earlier. He assumed the position of *Ketua Kampung* in 1985. His evidence amounted to little more than a bare assertion that the plaintiff's family possessed native customary rights over certain lands in the village. Although the lot numbers of the disputed lands were identified in his witness statement, he was unable, under cross-examination, to provide any estimate of their size or to describe their boundaries.

[55] His evidence does not assist the plaintiff's case. At the material time of the settlement exercise, he was working in Brunei and was therefore not

present. Moreover, he proved to be an evasive witness. He initially denied any knowledge of the Mengkalap Settlement Exercise, but later conceded that he had himself applied for land under that very exercise.

MAP 'M'

[56] Finally, we turn to the identification of the disputed lands as depicted in map 'M', which was tendered by the plaintiff. The learned High Court judge marked map 'M' for identification ('ID') only during the trial as objections were raised by the Government and the LCDA.

[57] The learned judge's reason for marking map 'M' as ID and not as an exhibit during the trial was because it was based on an official map produced by the Lands and Surveys Department and the original official map itself was not produced. During cross-examination, the plaintiff acknowledged that he did not prepare map 'M', which purportedly identifies his NCR lands, and that it was derived from an official map of the Lands and Surveys Department. He further testified that the original map was not in his possession, having been handed to one Willie Liau, who was not called as a witness. The plaintiff stated that Willie Liau is a lawyer. We are prepared to accept that map 'M' was based on an official map, as testified by the plaintiff.

[58] We are also prepared to accept that it is not a requirement that only a map prepared by a licensed surveyor pursuant to s 17 of the Land Code is admissible in court for the purpose of establishing a claim to native customary rights, unlike maps prepared for subdivision or planning approval purposes. Maps prepared by individuals who have familiarity with plotting positions on a map and have been accepted by the courts in NCR cases (for example see the judgment of Albert Linton J in the case of *Luking Uding & Ors v Superintendent of Lands and Surveys Kota Samarahan Division & Ors* [2011] MLJU 1594; [2011] 7 CLJ 342).

[59] As we said earlier, the learned High Court judge initially accepted the objection of the defendants during the trial that it cannot be marked as the original map was not produced and therefore it can only be marked as ID. Notwithstanding this ruling, His Lordship accepted the map 'M' as evidence at the decision-making stage and this is stated in the grounds of decision. However, the more crucial issue raised by the Government and LCDA is as follows and we find merit in it.

A IDENTIFICATION OF DISPUTED LANDS IN RELATION TO MAP 'M'

[60] The plaintiff merely pointed to map 'M' and said that the said lots edged in red are the lands that were in the possession of his family since the time B of his grandfather who had cleared the same for cultivation and settlement. The plaintiff never said that he is qualified to draw maps or identify areas on a map. He told the court he possessed only rudimentary education. However, the plaintiff pointed out the four lots on the map 'M' as corresponding to the very same lots that had been in his family's possession since the time of the Japanese C Occupation.

[61] From his own testimony, it is apparent that he arrived at this conclusion because the disputed lands, which had been plotted and delineated as numbered lots on a government map during the Mengkalap Settlement D Exercise, are situated in close proximity to the lands in respect of which his family had been granted title by the Government. Our reasons for this conclusion are as follows.

E **[62]** The plaintiff testified that he had drawn the area he claimed on a map and handed it to his lawyer. In his witness statement, he stated as follows:

> I drew the land boundary and showed them to my lawyer when we filed this case.

F **[63]** However, his lack of knowledge with respect to the size, boundary or the location of the lands that he claims is evident in the following answers he gave during cross-examination:

> Q: I put it to you that since you do not know the size of the individual NCR which you are now claiming today, it is impossible for you to have drawn the land G boundary of that NCR.
>
> A: There was a grant number and the Lot numbers also but I do not know the exact size.
>
> Q: Who decided on the boundaries of each individual lot?
>
> H A: The map was from Lands and Surveys.
>
> Q: Therefore, you are saying that you do not know the exact boundaries of the NCR lands which you and your family are claiming in court today.
>
> A: The land is near to the land that we already claimed which have a grant.

I

[64] The plaintiff subsequently asserted that he knew the boundaries of the lands he claims and further maintained that he was present when officers from the Lands and Surveys Department surveyed the area in 1976. However, the irresistible inference to be drawn from his evidence as a whole is that he merely

delineated the lands he now claims by following the plots mapped out by the Lands and Surveys Department during the Mengkalap Settlement Exercise. Those plots, which are presently either unencumbered State land or alienated land, constitute the disputed lands. The plaintiff's answers during cross-examination, set out below, lend further support to this conclusion:

> Q: Is the size and shape of the current boundaries as shown in ID2 which you are claiming today correctly represent your NCR?
>
> A: Yes.
>
> Q: So, you are in agreement that the area which you are claiming is reliant on information and boundaries determined by Lands and Surveys and not by you or your siblings?
>
> A: *It was measured by Lands and Surveys*.
>
> A: *Yes*.

[65] It is also evident that the plaintiff's claim to the disputed lands was founded on their proximity to one another, rather than on any actual ground survey capable of being correlated to a specific location on map 'M'. This is apparent from his response, under cross-examination by counsel for the LCDA, as to why he selected Lot 349, which had been alienated to LCDA:

> Q: Do you agree with me that you are being selective in choosing the lots belonging to you to show as evidence in this trial and the only true reason you adduce Lot 438 is because it is nearest to Lot 349 of Trusan Land District?
>
> You may refer to page 104 of DBD and cross-refer to page 2 of Bundle C. You have annexed something under annexure B. You only chose Lot 438 because it is nearest to Lot 349. Therefore, you are being selective. Do you agree with me?
>
> A: I agree.

[66] In a number of reported NCR cases the courts have accepted the evidence of a person who is neither a licensed nor a formally qualified surveyor, where a community mapper or someone familiar with mapping has given evidence correlating points on the ground on which a plaintiff asserts NCR, to their corresponding positions on a map. In the present case, however, the plaintiff did not call any such witness, whether a licensed surveyor, a community mapper, or any other person with the requisite familiarity with the plotting of positions on a map.

[67] In these circumstances, having upheld the defendants' objection during the trial and marked map 'M' for identification only, the learned High Court judge ought not to have accorded any weight to that map.

ORAL HISTORY

[68] In essence, the plaintiff has sought to prove his case solely by relying on oral history, which, as we have noted, is contradicted by the aerial photographic evidence from 1948 and 1958. He has merely reproduced a copy of an official map of the Lands and Surveys Department and indicated four demarcated lots thereon as having been in his family's possession since the period of the Japanese Occupation. The photographs of crops and fruit trees tendered by DW2 do not advance his case, as there is no evidence as to their location or the age of the trees. Unlike in other cases, there is also an absence of any corroborative historical evidence of cultivation, such as approvals, assistance, or recognition by the Government or its agencies in respect of his father's or grandfather's activities on the land.

[69] In the premises, the plaintiff's case rests entirely on the strength of his oral testimony. Accordingly, his credibility assumes considerable importance and is central to the success of his claim. We are mindful that the assessment of the credibility of a witness ordinarily lies within the province of the trial court. However, given that the High Court undertook no evaluation of the credibility of the plaintiff, that task also necessarily falls to us.

CREDIBILITY OF THE PLAINTIFF

[70] It is plain to us that the plaintiff's credibility is questionable. We say this for the following reasons. It is relevant to note that the plaintiff consistently maintained throughout his testimony that his grandfather and father had cleared the entirety of the disputed lands prior to 1958. He persisted in this claim even when confronted with the aerial photographic evidence. An example of his insistence is reproduced below:

> Q: Are you saying that the entire area of Lots 349, 702, 682 and 722 were cleared before 1958?
>
> A: Yes: They were cleared by my grandfather, my father and now we are still planting crops on the said lands. ...
>
> Q: I refer you to page 5 and 6, Exhibit P1. I put it to you that based on these two maps, it is quite clear that the majority of the area which you are claiming today was primary forest areas up to 1958.
>
> Therefore, what you have testified earlier is incorrect. Just answer whether you agree or not?
>
> A: I disagree.

[71] The plaintiff's claim is not plausible. Firstly, his evidence that all the lands were cleared and occupied by his family since the Japanese Occupation

was directly contradicted by the aerial photographs. A

[72] Secondly, he has not been candid regarding his knowledge of the Mengkalap Settlement Exercise. He acknowledged that he and his family had been allotted plots of land under this exercise, with the plaintiff himself receiving twelve plots in the same area. He admitted that he had sold some of these lands for monetary gain. The disputed lands were measured and plotted as part of the same exercise in 1976. The plaintiff contended that he had informed officers of the Lands and Surveys Department that the disputed lands belonged to his family. He questioned the validity of the settlement exercise. Yet, he claimed that he was unaware of the Settlement Orders in respect of the disputed lands and therefore, did not appeal the Government's decision. B C

[73] We find that the plaintiff's claim that he had no knowledge of the Mengkalap Settlement Exercise is manifestly a self-serving denial and wholly unconvincing as he contradicted himself several times in the course of his testimony. D

[74] In his witness statement, the plaintiff informed the court that when officers from the Lands and Surveys Department first visited his village in 1977 to survey land, he was told that the exercise related to a paddy planting scheme. He claimed that he was unaware of the Mengkalap Settlement Exercise or of the settlement orders concerning the disputed lands. However, during cross-examination, he conceded that not only was he aware of the settlement exercise at the relevant time, but he was also a beneficiary, having been granted title to 12 plots of land. E F

[75] During cross-examination of counsel for the Government he agreed that he was present and was aware of the settlement exercise conducted in 1976 and 1977. It was translated as 'proses tuntutan tanah'. His evidence is as follows: G

> Q: So, you were well aware that there was a settlement exercise (proses tuntutan tanah) conducted on lands in that area in 1976 and 1977, is that what you are saying? Yes or no? H
>
> A: Yes.

[76] He also admitted that he successfully claimed land in the Mengkalap Settlement Exercise. The admission appears in the following excerpt from the notes of proceedings: I

> Q: You agree with me that this land which are close by to the areas you are claiming here today were also part of the Mengkalap Settlement Area, the same as the area which you are claiming here today?

A: Yes, it is in the same block of Mengkalap.

Q: I refer you to page 104 of DBD. Do you agree with me that this map shows the lots which were granted to you by virtue of the Mengkalap Settlement exercise and the Settlement Order of 1976 and 1977?

A: Yes, it shows here.

[77] However, when it suited him, he strenuously denied knowledge of the Mengkalap Settlement Exercise or the settlement orders on the disputed lands. During cross-examination of counsel for the Government with respect to his knowledge of the Mengkalap Settlement Exercise, he said as follows:

Put: I put it to you therefore, you knew of the Mengkalap Settlement Exercise.

A: I do not know.

Put: I put it to you that, it is impossible for you to deny knowledge of the two Orders as both were under the same settlement process and that you had obtained land under that very same process.

A: I was working in Brunei.

Put: I put it to you, you have therefore abandoned the areas which you are claiming here today.

A: I disagree.

[78] In conclusion, the inconsistencies in the plaintiff's evidence, the absence of any supporting ground survey, and the aerial photographic evidence favouring the defendants collectively militate against placing any reliance on the plaintiff's account of oral history. Accordingly, the High Court's finding that the plaintiff had established that his family possessed native customary rights over the disputed lands is unsupported by the evidence and must be set aside.

[79] In the premises, the second agreed issue, ie whether the plaintiff had established NCR over the disputed lands must be answered in the negative and therefore, the remaining issues do not arise for determination and all the appeals ought to be decided in favour of the Government and LCDA. Nevertheless, for the sake of completeness, we shall group some of the said issues and address them briefly below.

SETTLEMENT ORDERS AND TIME BAR

[80] The High Court found that the settlement orders affecting the disputed lands, in particular Lot 349 which was alienated to the LCDA, had not followed the proper procedure; however, no reasons were provided for this finding. In the present case, the Government's evidence demonstrates that

settlement orders were issued over the disputed lands pursuant to s 95 of the Land Code, following the Mengkalap Settlement Exercise.

[81] In the present instance, the plaintiff successfully obtained twelve plots of land under the Mengkalap Settlement Exercise conducted circa 1976. Yet, he did not appeal the settlement orders pertaining to the disputed lands. While he disclaimed knowledge of those orders, he also asserted that he disagreed with the decisions of the department at the time and wished to lodge a complaint, but lacked the necessary resources to do so. He said as follows in his evidence during cross-examination by counsel for the Government:

> Q: I refer you to the Settlement Order of 1977 at page 17 of DBD showing Lots 399, 348 and 349 as state land. Do you agree with the Order?
>
> A: I disagree
>
> Q: If you don't agree, then why didn't you appeal against that Order?
>
> A: During that time, I came from poor family. I spoke to our head of Kampung or Ketua Kampung. The Ketua Kampung told me that the land was reserved. I asked him to go to town with me to see the Lands and Surveys officer and he refused.

[82] Therefore, the plaintiff was aware of the settlement orders affecting the disputed lands as far back as 1977, yet he did not challenge those orders. It is also significant that he does not contest the settlement procedure in respect of the lands that were allocated to him under the same Mengkalap Settlement Exercise. He said as follows:

> Q: Do you agree with me that by virtue of you having 12 lots and your siblings, Dayang and Bakar Tebari having their respective lots under the Settlement Orders 1976 and 1977, such settlement exercise carried out by the Lands and Surveys Department was carried out properly and thoroughly?
>
> A: I agree only for the grants that had been issued.

[83] The High Court found that there had been non-compliance with the settlement procedure, but offered no reasons for this finding. It has not been indicated to us what statutory provision was contravened. With regard to notice to the plaintiff, the evidence previously cited demonstrates that he was aware of the Mengkalap Settlement Exercise from the outset and knew that the disputed lands had not been allocated to him. In the absence of any appeal being lodged under the Land Code despite such knowledge, even if the plaintiff had proved NCR over the disputed lands, we are of the view that it is now too late for the plaintiff to challenge the orders made under the settlement exercise. Accordingly, the claim is barred by limitation.

ALIENATION TO LCDA

[84] This issue pertains to the appeal of the plaintiff that the High Court ought to have ordered rectification of the land register in his favour with respect to Lot 349. The said lot was alienated to LCDA under a lease.

[85] In our view, this claim of the appeal is without any merit. Even if the plaintiff had succeeded in establishing NCR over Lot 349, as correctly submitted by counsel for LCDA, the plaintiff would have been entitled to only damages from the Government. The reason is that in a number of cases decided by the Federal Court between 2014 and 2022, it was held that insofar as alienated land is concerned, indefeasibility of title shall prevail over pre-existing NCR. Thus, alienation of land by the State would extinguish NCR. In the premises, earlier precedents on this issue with respect to alienated land cannot be relied upon by a native who has successfully proved NCR to seek rectification of the register. The only remedy is to seek damages against the Government. Some of the said Federal Court cases which were cited by counsel for LCDA are:

(a) *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766; [2014] 9 CLJ 733;

(b) *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77; [2018] 1 CLJ 19; and

(c) *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2021] MLJU 2794; [2022] 3 CLJ 1.

[86] In the premises, this issue should also be answered in favour of the LCDA.

CONCLUSION

[87] In conclusion for the primary reason that the plaintiff failed to establish NCR over the disputed lands, we dismiss his appeal (Appeal 654) with no order as to costs and allow the appeal of the Government (Appeal 671) with costs of RM30,000 here and below and allow the appeal of the LCDA (Appeal 672) with costs of RM30,000 here and below.

Appeal 654 dismissed with no order as to costs; Appeal 671 allowed with costs of RM30,000 here and below; Appeal 672 allowed with costs of RM30,000 here and below.

Reported by Dzulqarnain Ab Fatar